Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2036

In The

Supreme Court of the United States

October Term, 1988

CITY OF EVERETT, ET AL.,

Petitioners,

v.

ROSE BORDANARO, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH J. BALLIRO*
JULIANE BALLIRO
BALLIRO, MONDANO & BALLIRO, P.C.
Three Arlington Street
Boston, MA 02116
(617) 227-5822

MARTIN K. LEPPO*
LEPPO & TRAINI
490 North Main Street
Randolph, MA 02368
(617) 961-3344

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Supplemental Statement of the Case 1

Reasons for Denying the Writ 5

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE OPPORTUNITY TO DEFINE A "CUSTOM" UPON WHICH MUNICIPAL LIABILITY MAY BE BASED 7

II. THE COURT OF APPEALS DECISION APPROPRIATELY APPLIED THE PRECEDENT OF THIS COURT ON THE QUESTION OF CAUSATION 10

III. THE DELIBERATE INDIFFERENCE STANDARD DOES NOT REQUIRE PROOF OF A PATTERN OF PRIOR MISCONDUCT BUT A DELIBERATE OR CONSCIOUS CHOICE BY POLICYMAKERS FROM AMONG VARIOUS ALTERNATIVES 13

IV. PUNITIVE DAMAGES WERE PROPERLY AWARDED AGAINST THE MUNICIPAL OFFICIALS BASED UPON A RECKLESS OR CALLOUS INDIFFERENCE TO FEDERALLY PROTECTED RIGHTS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 7

Bennett v. Slidell, 728 F.2d 762 (5th Cir. 1984) 9

Canton v. Harris, ___ U.S. ___, 109 S.Ct. 1197 (1989) 8, 10, 13

Fundiller v. Cooper City, 777 F.2d 1436 (11th Cir. 1985) 9

Gilmere v. Atlanta, 737 F.2d 894 (11th Cir. 1984) 7, 8, 9

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 9

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 7, 10

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 5

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 10

Pembaur v. City of Cincinnatti, 475 U.S. 469 (1986) 13

Penzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S. Ct. 1519 (1987) 5

Polk County v. Dodson, 454 U.S. 312 (1981) 10

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 6

Smith v. Wade, 461 U.S. 30 (1983) 15

Spell v. McDaniel, 824 F.2d 1380 (4th Cir.), cert. denied, 108 S.Ct. 752 (1988) 8, 9

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 7

TABLE OF AUTHORITIES – Continued

Page

Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) cert. denied, 474 U.S. 1100 (1986) 8, 9

Webster v. Houston, 735 F.2d 838 (5th Cir. 1984) 9

COURT RULES:

Federal Rule of Civil Procedure 51 11

SUPPLEMENTAL STATEMENT OF THE CASE

The petitioners were found liable upon two separate theories; first, the existence of a facially unconstitutional custom or practice that permitted police officers to break down doors to arrest fleeing felons in violation of constitutional protections against unlawful searches and seizures, and, second, a policy of deliberate indifference in the recruitment, training, supervision and discipline of Everett police officers.[1]

Evidence of municipal and official liability, beyond evidence of the incident itself, was abundant. With respect to the above-described facially unconstitutional practice, the evidence revealed 50 or 60 prior occasions where doors had been broken down by Everett Police Officers and approximately 20 to 30 such incidents where whatever force was necessary to break down doors to gain entry was utilized (A9).* City of Everett Police Sergeant Carl Ferullo (hereinafter the "Sergeant") testified that the practice of breaking down doors in pursuit of fleeing felons under circumstances such as those presented here was a practice always applied in the City of Everett Police Department (A9). (See also Trial Transcript, Volume 5, Page 43, Testimony of Carl Ferullo).

---

[1] The City and the Chief were found liable under both theories. The Mayor was found liable under the latter theory, the only theory submitted to the jury as it pertained to the Mayor.

* (A___) refers to the appendix attached to the Petition for Writ of Certiorari. Many of the facts set forth here are contained in the First Circuit opinion.

In the years preceding this event, City of Everett Police Chief Donald Bontempo (hereinafter "Chief") utilized an extensive report review process through which he monitored the conduct of his officers on a daily basis and was alerted to practices that violated department policy (A11). Subsequent to this incident the Chief, having been briefed regarding the nature of this incident, announced over the televised media that his officers were acting within the performance of their duties (R. 9-128).[2]

The evidence also revealed that the City of Everett Police Department operated under a wholly deficient set of rules and regulations promulgated in 1951 and last distributed to the officers in the mid-sixties (A16). The rules and regulations, which comprised the department's day-to-day guidelines, failed to address contemporary law enforcement standards, including those governing search and seizure, hot pursuit, and the use of deadly force (A16).

Everett officers lacked necessary, important and current training in many police procedures, including the proper use of force. Officers were discouraged from pursuing supplementary training courses and were forced to sue the City for statutorily mandated benefits earned through the successful completion of college law enforcement courses (A17). Supervisory officers lacked the basic training due all officers and the command training necessary to effectively supervise and operate a police force (A17).

---

[2] Trial Transcript, Volume 9, page 128, Testimony of Donald Bontempo.

The evidence demonstrated that in the years prior to this incident, the Chief and Mayor Edward Connolly (hereinafter "Mayor") had been bombarded with oral and written requests for additional training and organizational improvements (A18). Both the Mayor and the Chief had received complaints from Everett officers concerning inadequate police training and the dangers that this presented to civilians, had discussed the issue and its consequences and had determined that no more training would be provided (A18). Subsequent requests for improved training by Everett police officers were likewise ignored (A18).

Prior to this incident Lieutenant Stewart, an ardent advocate for improved training, supervision and control among the Everett officers, informed both the Mayor and the Chief that something terrible would happen if more instruction were not provided to the police force (A18). Upon his later retirement, the Chief advised Stewart that he did him a big favor and discarded his memos (R. 11-100).[3] Those memos dealt with guidelines, policies, and training (R. 11-102).[4]

The Chief of Police failed to make written, monthly reports to the Mayor concerning the department, as was required by city ordinance, and violated a city ordinance

---

[3] Trial Transcript, Volume 11, Page 100, Testimony of Lieutenant George Stewart.

[4] Trial Transcript, Volume 11, Page 102, Testimony of Lieutenant George Stewart.

by failing to submit police recruits to required psychological examinations (A17). Background checks of prospective officers, which are the best indication of future performance, were superficial, at best, and failed to reach minimal levels of acceptability (A17).

In the past, discipline had been meted out haphazardly, inconsistently, and infrequently to Everett officers (A18). The Mayor and the Chief were aware of the acts perpetrated here yet chose to take no disciplinary actions against the officers until they had been indicted (A21). A full, internal investigation by the Everett Police Department did not occur until over one year after the incident (A18).

Ferullo's short suspension was subsequently overturned on appeal, based in part, on the fact that he had received inadequate supervisory training for the position of Sergeant (A18).[5]

The police department lacked sufficient guidelines and placed too much discretion at all operating levels (A17). The review of civilian complaints for police misconduct fell well below accepted levels. Many complaints were placed in a dead letter drawer never to be seen again (A18).

The Chief testified that accountability of police officers was handled in the same manner prior and

---

[5] Ferullo testified at Volume 4, Pages 157-158, that the Chief told him, "The Mayor felt that the brass should take a part of the blame for this." Ferullo was suspended for a period of four days.

subsequent to this event.[6] In a 1983 letter concerning an officer's misconduct, the Chief wrote: "Gone are the days when accountability is scoffed at." (A18)

REASONS FOR DENYING THE WRIT

Certiorari is granted only in cases involving issues of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeals *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453 (1951). The asserted impact of the judgment on the treasury of the City of Everett and its taxpayers is not an appropriate basis upon which the petition should be granted. See *Penzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519 (1987) (Blackmun, J., concurring).

Moreover, the budgetary and financial resource descriptions contained on pages 10 and 11 of the petition should be stricken as improper and irrelevant to a determination of the issues before the Court.[7]

---

[6] Trial transcript Volume X, Page 114, Testimony of Donald Bontempo.

[7] Earlier in these proceedings the City asserted that it had both the ability and the intention to pay the judgment in full upon entry of final judgment. The current Mayor and City Treasurer each filed affidavits with the First Circuit in connection with a bid to obtain a stay pending appeal without posting

(Continued on following page)

" 'Special and important reasons' which may justify the grant of a writ of certiorari imply a reach to a problem beyond the academic or the episodic; this is especially true where the issues involved reach constitutional dimensions, for then there comes in to play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955).

Here, the decision of the Court of Appeals for the First Circuit fairly echoes the standards of custom, causation and fault already articulated by this Court pertaining to municipal and official liability and is limited in scope to an application of the outrageous facts of this case to those well established standards. Application of the facts here to the standards urged by the petitioners would push the principles of municipal and official liability to the precipice of extinction.

As no real or embarassing conflict of opinion exists among the circuits on the issues raised by this petition, certiorari on those grounds should likewise be denied.

(Continued from previous page)

the required supersedeas bond. In his affidavit, Mayor McCarthy attested to the City's "sound financial condition." City Treasurer Frank Lewis attested to the City's ability to pay the judgment by three alternative methods and asserted that the method selected was, "a matter of planning and the selection of policy alternatives."

I.

THIS CASE DOES NOT PRESENT AN APPROPRIATE OPPORTUNITY TO DEFINE A "CUSTOM" UPON WHICH MUNICIPAL LIABILITY MAY BE BASED.

This court has already determined that a municipality may be held liable for violations that directly result from unconstitutional customs or practices and also for a failure to adequately train where that failure amounts to a deliberate indifference to the need for such training *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978); *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989). This Court has also defined the term "custom" for purposes of assessing municipal liability as, " . . . the existence of a widespread practice that, although not authorized by written law or express policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970); *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978). More recently, in *St. Louis* v. *Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 927 (1988), this Court implied that municipal liability could attach, " . . . if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware . . . "

The petitioners, citing *Gilmere* v. *Atlanta*, 737 F.2d 894, 902 (11th Cir. 1984), urge this court to depart from the principles of *Adickes* and *Praprotnik* and adopt a more stringent standard that would permit, under circumstances such as those presented here, a finding of municipal liability only where a policymaker creates,

establishes, or has direct personal knowledge of a municipal custom. Thus, proof of the continued persistence of a practice or custom, facially unconstitutional or otherwise, would not suffice to establish municipal liability, in the petitioners' view, even if the policymaking officials should have known of the custom and the likelihood of constitutional violations, yet did nothing to curtail it. The exclusion of the principle of "constructive knowledge" would virtually preclude the imposition of municipal liability based upon non-action, a result that is clearly at odds with this Court's recent decisions and the uniform position of the circuits on this issue. See *Canton* v. *Harris*, U.S. ___, 109 S.Ct. 1197, 103 L.Ed. 2d 412, 431 (1989) (O'Connor, J., concurring).

Despite petitioners' contention, a careful review of *Gilmere, supra* and the opinions of other circuits deciding this issue reveals no clear division of authority regarding the standards or quantum of proof to be applied. Here, the First Circuit applied the principles enunciated in *Spell* v. *McDaniel*, 824 F.2d 1380, 1386-88 (4th Cir.), cert denied, 108 S.Ct. 752 (1988) and *Voutour* v. *Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986), in concluding that, in order for a custom or practice to be attributable to a municipality, "it must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice (A8). *Gilmere* would permit a finding of liability where a policymaker makes, establishes, approves of, or encourages the custom or practice, id. at 902. Additionally,

knowledge, whether actual or constructive, of a widespread or persistent custom or practice has been uniformly required by the circuits deciding this issue. *Spell* v. *McDaniel*, 824 F.2d 1380, 1386-88 (4th Cir.), cert. denied, 108 S.Ct. 752 (1988); *Voutour* v. *Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986); *Gilmere* v. *Atlanta*, 737 F.2d 894, 902 (11th Cir. 1984); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Fundiller* v. *Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985); *Webster* v. *Houston*, 735 F.2d 838 (5th Cir. 1984); *Bennett v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984).

Despite the manner in which the issue is presented, what the petitioners really seek is a review of the legal sufficiency of the evidence presented here in support of the custom alleged. Yet, the outrageous facts of this case do not provide this Court with a workable blueprint from which the limits of municipal liability should be defined or with a solid footing upon which to apply a more stringent standard of proof where a "custom" as opposed to a "policy" is alleged.

The Sergeant's testimony was uncontradicted by both the Mayor and the Chief and neither denied a knowledge of the practice as it was described. Instead, the Chief testified that he kept abreast of the actions of his police officers by reviewing all police reports for departures from accepted policy and procedure. Those reports were then forwarded directly to the Mayor for his review on a daily basis. There was no evidence that the Mayor or the Chief took any steps to curtail the practice after review of the reports.

Finally, the Chief expressly condoned and ratified the conduct engaged in here when he announced over the televised media that his officers were acting within the performance of their duties.

Given the evidence presented here, the jury was well warranted in concluding that the custom here went well beyond one lower level employee's mistaken view of the law.[8]

II.

THE COURT OF APPEALS DECISION APPROPRIATELY APPLIED THE PRECEDENT OF THIS COURT ON THE QUESTION OF CAUSATION.

Contrary to the petitioners' claim, the First Circuit did not take an approach that permitted recovery on the basis that the policies and custom alleged merely facilitated the unconstitutional conduct that occurred here.

Citing *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989), *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985), *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), and *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the First Circuit ruled that a plaintiff seeking to impose municipal liability must prove a direct causal

---

[8] Petitioners assert that the evidence merely demonstrated Ferullo's mistaken view of the law as it existed prior to 1975. Of course, the evidence also demonstrated that Ferullo received no training regarding changes in the relevant laws even when he assumed the position of sergeant. Petitioners should not be permitted to take refuge in Ferullo's incompetence, particularly where that incompetence was as the result of inadequate training by the petitioners.

connection between the conduct alleged and the injuries suffered and must establish that the municipal policy is affirmatively linked to and the moving force behind the constitutional violation (A21-A22). The Court then held that the trial judge's instruction properly apprised the jury of the above stated standard.[9]

The petitioners now contend that the Court's use of the word "an" in describing the necessary link as "an affirmative link" and the word "a" in describing the term "a moving force" permitted the imposition of liability if the policy or custom merely formed a link in the chain that led to the constitutional violation. However, since there was no objection to the Court's use of the terms "a moving force" and "an affirmative link", the petitioners have failed to properly preserve the issue and the petition on this ground should be denied.

Rule 51, Federal Rules of Civil Procedure is clear:

> [n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.

Even assuming the issue was properly preserved, this jury was not instructed, and the First Circuit did not hold, that liability could be found if the conduct was merely a substantial factor in bringing about the harm or if the conduct set in motion a chain of events that led to the ultimate harm. Here again the petitioners' quarrel, not with the court's articulation of the standard, but with

---

[9] The court's instruction on causation is set forth in the Petitioners' appendix at A44-46.

its conclusion that the court's instruction and testimony presented was sufficient to meet that standard.

The petitioners' claim that a proper analysis of the causation issue requires consideration of training, recruitment, supervision and discipline as separate and distinct bases for liability ignores both the nature of the evidence presented here and the facts of the incident itself. The petitioners have continually declined to acknowledge that any significance could properly attach to the fact that these unconscionable acts of violence were perpetrated by, or in the company of, the entire evening patrol force of the police department all acting in unison and beyond the city limits. This case did not present an example of one or more isolated, defective policies. This case presented an example of the consequences that inevitably result from the continued operation of a police department that was pathetically flawed in virtually every aspect of its existence. This was a department where discipline, supervision and training were virtually nonexistent, where accountability was scoffed at and where this unspeakable conduct was later condoned by the Chief when he publicly announced that his men had acted in the performance of their duties as police officers. The record is replete with evidence of a pervasive, persistent and deliberate indifference on the part of the Mayor and Chief with respect to virtually every aspect of the department's operation.

The record in this case supports the First Circuit's resolution of the question presented here. Since the appropriate standards were applied and since the position urged by petitioners would preclude a finding of

municipal liability even in those instances where the policies alleged are a moving force of, and affirmatively linked to, the harm suffered the petition should be denied on this ground.

III.

THE DELIBERATE INDIFFERENCE STANDARD DOES NOT REQUIRE PROOF OF A PATTERN OF PRIOR MISCONDUCT BUT A DELIBERATE OR CONSCIOUS CHOICE BY POLICYMAKERS FROM AMONG VARIOUS ALTERNATIVES.

In *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197, 103 L.Ed.2d 412, 427 (1989), this Court recently disposed of the petitioners' claim that the deliberate indifference standard requires proof of a pattern of misconduct before municipal liability may attach based upon a failure to train. The lack of training at issue here, in and of itself, evidences a deliberate indifference to constitutional rights since the need for relevant training was so obvious that the inadequacy was extremely likely to result in the violation of constitutional rights.[10]

The record is also replete with evidence of a lack of minimally acceptable standards in the areas of supervision, discipline and control. In light of the duties assigned to these police officers, the need for supervision,

---

[10] The jury in this case was instructed to apply the "deliberate indifference" standard and was twice read this Court's plurality holding in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292 (1986). This portion of the instruction, is set forth on pages A44-A45 of the petition.

discipline and control was also so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the Mayor and Chief can be said to have been deliberately indifferent to the need.

The testimony of the Sergeant and the police expert also provided an ample basis upon which a jury could conclude that the Everett Police so often violated constitutional rights that the need for additional training, supervision, discipline and control must have been plainly obvious to the city policymakers. The plainly obvious need for additional training was also demonstrated by the continuous pre-incident requests and warnings that were deliberately disregarded by both the Mayor and the Chief.

IV.

PUNITIVE DAMAGES WERE PROPERLY AWARDED AGAINST THE MUNICIPAL OFFICIALS BASED UPON A RECKLESS OR CALLOUS INDIFFERENCE TO FEDERALLY PROTECTED RIGHTS.

Contrary to the petitioners' claim, punitive damages were not awarded here merely based upon the assumptions that they should have known of the department's failures. The First Circuit is clear in holding that punitive damages were warranted based upon evidence of the Mayor and Chief's reckless or callous indifference to the federally protected rights of others. A punitive damage award does not require that the city officials themselves

wield the instruments of destruction. A reckless or callous indifference to the rights of others was clearly demonstrated by the manner in which the Mayor and the Chief operated, or failed to operate this police department. Thus, the punitive damage award here falls well within the parameters of *Smith* v. *Wade*, 461 U.S. 30, 56 (1983).

CONCLUSION

For the reasons stated above, the respondents request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully Submitted,

Joseph J. Balliro
Juliane Balliro*
Balliro, Mondano & Balliro, P.C.
Three Arlington Street
Boston, MA 02116
(617) 227-5822

Martin K. Leppo
Leppo & Traini
490 North Main Street
Randolph, MA 02368
(617) 961-3344

*Application for admission pending